BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEITH A. CRAMER Claimant	)	
VS.	)	
LEARJET, INC. Respondent	)	Docket No. 270,191
AND	)	
CIGNA PROPERTY & CASUALTY Insurance Carrier	)	

ORDER

Claimant requested review of the November 22, 2005 Review and Modification Award by Special Administrative Law Judge (SALJ) Vincent Bogart.[1] The Board heard oral argument on April 11, 2006.

APPEARANCES

Steven R. Wilson, of Wichita, Kansas, appeared for claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

[1]The administrative file does not contain an order appointing Mr. Bogart as a Special Administrative Law Judge or assigning this claim to him for determination. At oral argument before the Board, counsel for the parties said they made no request for the Director to reassign this case to a Special Administrative Law Judge. Nevertheless, the parties agreed that no issue was being raised for the Board's review as to Mr. Bogart's jurisdiction or authority to enter an award in this matter nor were there any issues concerning the procedure for or notice of the apparent assignment of this case to a Special Administrative Law Judge.

ISSUES

The SALJ modified the November 12, 2002, Agreed Award on the issue of temporary total disability (TTD) benefits only. The SALJ found that claimant is entitled to an additional 12 weeks of TTD. The SALJ, however, found that claimant did not prove a change in condition necessary to entitle him to additional functional impairment or work disability, and review and modification of those issues were denied. The SALJ also denied claimant's request for an award against respondent for post-award attorney fees, instead approving claimant's contingency fee contract, presumably because additional compensation was awarded in the form of TTD.

Claimant argues that the additional shoulder and neck surgeries he underwent after the Agreed Award was entered on November 12, 2002, resulted in an increase of his functional impairment and restrictions. Claimant also argues that his ability to earn wages has diminished, but because he has made a good-faith effort to find employment, he is entitled to a 100 percent wage loss. He contends his task loss is 57 percent which, when averaged with his 100 percent wage loss, results in a 78.5 percent work disability. Accordingly, he claims he is entitled to modification of the Agreed Award, which provided for weekly payments based upon a lump compromise sum of $60,000 plus the TTD previously paid, which equated to a 39 percent permanent partial disability. Claimant also requests that if additional compensation is denied, then the case be remanded to the SALJ with instructions to assess attorney fees to claimant for post-award representation pursuant to K.S.A. 44-536(g).

Respondent and its insurance carrier (respondent) argue that claimant is not entitled to additional TTD benefits. In all other matters, respondent requests that the Award entered by the SALJ be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent since 1999 and claimed a series of accidents starting in January 2000 and ending in March 2001. As a result of that series of injuries, on May 23, 2001, claimant underwent a two-level fusion of his cervical spine performed by Dr. Eustaquio Abay and rotator cuff repair of his left shoulder performed by Dr. J. Mark Melhorn on November 19, 2001.

Within a couple months after claimant's neck surgery, he started having additional problems. He described the symptoms as continuing sharp pains when he turned his neck, and popping and cracking in his neck when he turned it. Claimant also complained that his left shoulder continued to bother him after his first shoulder surgery.

Claimant had a functional capacity evaluation (FCE) performed at the request of Dr. Frederick Smith, on August 9, 2001. This FCE was performed after claimant's back surgery but before his left shoulder surgery. Dr. Smith, in following the FCE, restricted claimant to occasional lifting from chair to the floor up to 62 pounds, lifting above the shoulders to 34.6 pounds, lifting from desk to chair up to 72.8 pounds, and carrying up to 62 pounds.

Dr. Philip Mills, who is board certified in physical medicine and rehabilitation, first saw claimant at the request of his attorney on April 15, 2002, before the Agreed Award was entered. He reviewed claimant's medical records, took a history and performed a physical examination. Claimant told him he felt improvement in his neck for awhile after the surgery that had been performed by Dr. Abay, but then he noticed pain in his left shoulder and upper extremities. Claimant reported that he was referred to Dr. Melhorn and was diagnosed with a partial rotator cuff tear. After a period of conservative treatment, Dr. Melhorn performed a rotator cuff repair. Although claimant did not notice any substantial difference in his shoulder after this procedure, Dr. Melhorn released him as being at maximum medical improvement (MMI) in March 2002.

When Dr. Mills saw claimant in April 2002, claimant was complaining of pain in his neck and left shoulder, which he described as a sharp, stabbing pain with numbness and tingling occasionally down the left arm. He also complained of popping with certain shoulder movements. The pain was aggravated by lifting over shoulder level and turning his head to the left. On a scale of 0 to 10, he described the pain as an 8. He reported to Dr. Mills that his work restrictions were to avoid overhead work and lift no more than 35 pounds.

Dr. Mills diagnosed claimant with bilateral radiculopathy and left shoulder rotator cuff injury with residual range of motion deficits. He opined that there was a causal relationship between claimant's complaints and his injury of January 2000. He believed that claimant was at MMI and rated him at 30 percent permanent partial disability to the body as a whole. He recommended that claimant avoid overhead work and adopted the FCE for specific restrictions. Dr. Mills did not think any further testing or treatment would be required.

On November 12, 2002, the parties entered into an Agreed Award. In the Agreed Award, the ALJ found that claimant had an approximate 30 percent functional impairment to the body as a whole. The ALJ also found that claimant was no longer working and had a claim for work disability, and the Agreed Award was based in part on claimant's work disability claim. Claimant was paid a lump sum of $60,000, which represented an approximate 39 percent work disability. The Agreed Award left open claimant's right to future medical and review and modification upon proper application.

After the Agreed Award was entered, claimant looked for work. The first job he found was about four to six months after the Agreed Award was entered. He found a job working as a finish carpenter for Ferraro Custom Cabinets (Ferraro). He worked at that job

for four days, after which was he terminated because he could not do the heavy lifting. He testified that he had been told by his doctors that he had a 35 pound weight limit, and he refused to lift more than 35 pounds. Claimant testified that the owner of Ferraro knew that he had a workers compensation claim and a 35-pound weight limitation when he was hired. Nevertheless, he was asked to lift beyond the 35-pound limit, and when he refused, he was terminated.

About a week or two after claimant's termination from Ferraro, he found a job at All Size Shed (All Size). He worked there for about a week. He left that employment because it required heavy, repetitive lifting. After he left All Size, he got a third job building windows at ARKO. He was not sure how long he worked there but thought it was four days to two weeks. He was laid off from ARKO because it required him to lift more than he was permitted within his restrictions. Claimant said he did not do any activities outside of his restrictions, including his 35-pound lifting restriction, while working for any of these three employments after the Agreed Award. When asked if he noticed an increase in his symptoms while working for All Size and ARKO, he said that at the time, he was in a lot of pain because bone fragments were hitting his nerves.

On February 6, 2003, claimant filed an Application for Post Award Medical, requesting post-award medical treatment for his neck and shoulder. The ALJ ordered treatment with Dr. Abay. Dr. Abay performed a decompressive laminectomy at C-4-5-6-7 on August 22, 2003. Claimant said this second cervical surgery was to remove bone fragments that were hitting his nerves.

On February 12, 2004, claimant filed another Application for Post Award Medical, claiming he was having problems with his left shoulder and neck. On June 22, 2004, Dr. James Gluck performed arthroscopic surgery on claimant's left shoulder to clean up torn ligaments. Dr. Gluck released claimant with restrictions of lifting no more than 35 pounds, no extension of his arms over 18 inches, and no overhead lifting.

Claimant contends he still has problems with his left shoulder that are a continuation and worsening of his work-related injuries. He cannot lift anything; the higher he tries to lift, the weaker his arm gets and the sharper the pains become. Claimant also states he is limited on how he can move his neck up, down or sideways, and he still has sharp pains from the base of his neck down about eight inches. He testified that he suffers from headaches at the base of his head and neck, that he cannot sleep, and that he suffers pains which shoot through the side of his neck down his arms, switching from side to side. He testified that his arms tingle and he loses his grip, causing him to drop things. He testified he did not have the pain or tingling in his arms at the time he entered into the Agreed Award. Although he had popping in his shoulder after his first shoulder surgery, it is worse now. The second surgery performed by Dr. Abay improved his symptoms but did not take them away, and he said he now has permanent nerve damage.

But on cross-examination at the Regular Hearing, when asked whether the symptoms he had before the second surgery were the same after the second surgery, claimant described his symptoms as about the same or even better than when the Agreed Award was entered. Claimant testified:

> A. They are different. I had nerve damage from the years of having that in there, I have permanent nerve damage, it's not going to go away, there is nothing they can do about it.
>
> Q. So you don't think the surgery, the second surgery that Abay did, improved your condition?
>
> A. Yes, he improved my conditions, he did improve the conditions.
>
> Q. Did it improve your symptoms?
>
> A. But it did not take it away.
>
> Q. Did it improve your symptoms?
>
> A. Yes.
>
> Q. So do you believe personally that you are better now than you were when we entered the agreed award in November of 2002, which would have been after the–only after the first surgery that was performed?
>
> A. I think I'm about the same.[2]

Claimant has not worked since his job with ARKO in May 2003. After claimant was released by Dr. Abay following his second neck surgery, he again began looking for a job. He submitted a list of 31 potential employers he contacted concerning employment. He is continuing to look for work, even though he has been notified that he is eligible for Social Security disability benefits and states that he is unable to work at the present time.

Dr. Mills again saw claimant on January 20, 2005, for a re-evaluation. Claimant reported to him that after his previous evaluation in April 2002, he continued to have pain. He had been seen again by Dr. Abay and, on August 22, 2003, Dr. Abay performed a decompressive laminectomy at C4-5-6-7 with foraminotomy over the C5-6-7 roots bilaterally. The post-operative diagnosis was cervical spondylosis with lateral recess stenosis at C4-5-6-7.

Claimant also continued to have complaints of pain in his left shoulder. On May 6, 2004, Dr. Gluck performed arthoscopic surgery on claimant's left shoulder. Claimant was

---

[2]R.H. Trans. (May 11, 2005) at 47-48.

sent to physical therapy and had injections. Dr. Gluck told claimant to avoid repetitive overhead and reaching activity with his left hand.

Claimant argues that he was unable to work for six weeks after each of his surgeries after the Agreed Award was entered: the neck surgery of August 22, 2003, and the left shoulder surgery of June 22, 2004. This is the basis for his claim that he is entitled to 12 weeks of TTD compensation.

Respondent argues that claimant was not working at the time of his surgeries, and since the surgeries were not the reason claimant was not working, he should not be entitled to TTD compensation. Respondent also asserts that claimant has not provided a physician's note taking him off work, and he was still receiving permanent partial disability benefits at those times pursuant to the Agreed Award.

The Board agrees with the SALJ that claimant is entitled to 12 weeks of TTD. Claimant's testimony alone is sufficient evidence of his physical condition.[3] Claimant's testimony that he was unable to work, not at MMI, and was not released by the treating physicians until approximately six weeks after each of his two surgeries, is uncontradicted, not improbable, and therefore will be accepted as true. "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[4]

Claimant maintains that because he underwent two additional surgeries and because his lifting restriction was lowered from 62 pounds to 35 pounds, he is entitled to a modification of the Agreed Award and an increase in his permanent partial disability. Claimant argues that Dr. Mills raised his functional impairment from 30 percent to 35 percent. Claimant also argues that he has made a good-faith effort to become reemployed, has been unable to find a job, and now has a 100 percent wage loss. This wage loss, combined with his 57 percent task loss, would compute to a work disability of 78.5 percent. In the alternative, using an imputed wage based upon the ability opinion of Mr. Hardin, claimant would have a 67 percent wage loss, which when averaged with the 57 percent task loss, would compute to a work disability of 62 percent. Claimant argues that any evidence of work disability in excess of 39 percent, which claimant alleges was the basis for the Agreed Award, establishes an increase in claimant's work disability and a change of circumstances that warrant a modification of the Agreed Award.

At the time of the Agreed Award, claimant was not employed but was looking for employment. He had not been successful in finding employment after he was released by Drs. Abay and Melhorn. He testified that he had been assigned restrictions by both Dr.

---

[3] *See Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[4] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

Abay and Dr. Melhorn after they released him and before the Agreed Award. Although the record does not have any records of Drs. Abay and Melhorn concerning their restrictions, claimant testified that he was told he had a 35-pound lifting restriction. Claimant also testified as follows:

> Q. And the restrictions that you have described today about your range of motion and what you can and can't do, those restrictions are largely the same restrictions that you had from your previous shoulder and neck surgeries that were–the first surgeries, correct?
>
> A. I believe so. Correct.[5]

Upon examining claimant a second time in January 2005 in regard to his request for review and modification, Dr. Mills diagnosed claimant with bilateral radiculopathy necessitating multi-level fusion and left shoulder rotator cuff injury necessitating two surgical procedures with residual range of motion deficits and positive impingement signs. He opined that there is a causal relationship between claimant's current complaints and his injury of January 2000. Dr. Mills rated claimant's back at 25 percent permanent partial impairment to the body as a whole for the cervical problem and testified this was unchanged from claimant's impairment of April 15, 2002. Dr. Mills also rated claimant as having a 10 percent permanent impairment to the left upper extremity as a result of loss of range of motion and a 10 percent permanent partial impairment for the acromioplasty procedure. This combined for a 19 percent partial impairment to the left upper extremity, which is an 11 percent whole body impairment. Using the AMA *Guides*, claimant would have a 33 percent whole body impairment, which Dr. Mills rounded to 35 percent. Dr. Mills opined that claimant had an additional 7 percent impairment to the whole body over his impairment of April 15, 2002.

Dr. Mills acknowledged that the 2002 shoulder rating was only for range of motion, and at the time of the 2005 examination, Dr. Mills gave claimant an additional 10 percent for a shoulder acromioplasty surgery. However, claimant had already undergone this procedure once at the time of the 2002 examination, so that additional 10 percent rating would have been appropriate at the time of the 2002 examination. When asked why he did not give this rating in 2002, Dr. Mills replied, "Should have, just didn't."[6] In other words, claimant has no increased functional impairment. Respondent also contends that even if claimant does have some increased functional impairment, at most his functional impairment is 35 percent, which is still less than the level of his previously awarded work disability of 39 percent.

---

[5]R.H. Trans. at 28.

[6]Mills Depo. at 40.

Dr. Mills recommended that claimant continue to avoid overhead work and neck hyperextension and avoid reaching and lifting greater than 35 pounds. When asked how claimant's restrictions have changed from April 2002 to January 2005, Dr. Mills testified:

> A. In some ways they haven't. In some ways they have. He still has, he continues to have the restrictions in overhead work and neck hyperextension, that's not changed. Now, however, he has restrictions of 35 pounds to the maximum, whereas, before his maximum lift . . . I think it was over 60.
>
> Q. And that was under pursuant to the FCE that was adopted by you back in 2002?
>
> A. That's correct.[7]

Dr. Mills reviewed a task list prepared by Jerry Hardin. He had seen the list before in anticipation of prior litigation. He testified that he would make no changes to the document from when it was originally provided to him, and there are no additional tasks he would exclude from the task list because of the variance between the 62 and 35 pound lifting limitation. Dr. Mills agreed that claimant had no difference in task loss between 2002 and 2005.

Mr. Hardin saw claimant one time only, on May 22, 2002, at the request of claimant's attorney. When Mr. Hardin saw claimant in 2002, he believed that claimant could earn $340 a week. Mr. Hardin testified that claimant has now been accepted for Social Security disability. He testified, however, that "if I look at him with the information that I have in my file and the notes that I have taken, there were still some jobs out there that he could do."[8] Because claimant's lifting restriction has been lowered from 62 pounds to 35 pounds, Mr. Hardin opined that the potential wage he could earn would drop from $8.50 per hour to $7.50 or $8 per hour, or from $340 per week to $300 or $320 per week.

Respondent counters that after the Agreed Award, claimant had three different jobs. Claimant testified he refused to lift more than 35 pounds during his employment with these employers. Accordingly, respondent claims that claimant was controlled by a 35-pound weight restriction even before it was formalized by Dr. Mills. The Board agrees. Even though Dr. Mills reduced his lifting restriction from 62 to 35 pounds, this 35 pound lifting restriction had previously been recommended to claimant by other physicians, and this was the restriction claimant has been following since before the Agreed Award was entered. Claimant has failed to prove any change in his work restrictions, task loss or wage loss. Accordingly, claimant has not had an increase in his work disability. Dr. Mills was the only physician who testified, and he opined that even with a decrease in claimant's lifting restriction from 62 pounds to 35 pounds, he had no increased task loss. Claimant was not

---

[7]Mills Depo. at 31.

[8]Hardin Depo. at 15.

working at the time of the Agreed Award and is not working at the present time. Therefore, claimant's actual wage loss was 100 percent both now and at the time the Agreed Award was entered. Claimant has not proven a change in his circumstances relating to either his actual wage or his ability to earn wages since the Agreed Award was entered into. His actual 100 percent wage loss has not changed. Likewise, the restrictions claimant is following have not changed. Thus, there has been no change in either his task loss or his wage earning ability. With no change in either wage loss or task loss, there is no change in claimant's work disability. While it is granted that claimant's compromise settlement equates to a 39 percent work disability, a settlement is not determinative of claimant's condition at the time of the Agreed Award.[9]

Furthermore, it is claimant's burden to prove a change in circumstances before a modification of the award can be ordered.[10] Although claimant has undergone two additional surgeries since the Agreed Award, it appears that these procedures have improved claimant's symptoms, or at least left them the same. Dr. Mills' change in claimant's functional impairment rating seems to be more a change in approach or a revision of his earlier opinion. It does not establish that claimant is functionally more impaired or disabled. Dr. Mills' change in claimant's maximum weight lifting restriction just puts Dr. Mills in line with what other physicians had recommended previously and what claimant had been observing.

Claimant requests that in the event the Board does not grant review and modification of this award, this matter be remanded to the SALJ with instructions to assess fees to claimant's counsel for post-award representation pursuant to K.S.A. 44-536(g). As the Board is affirming the SALJ's award of additional TTD, this issue is moot.

Finally, the concurring and dissenting opinion below has raised the question of whether the SALJ was assigned to issue an award in this claim. Nonetheless, because the parties do not question SALJ Bogart's jurisdiction, do not object to the procedure employed by the Director in apparently assigning this matter to him, and do not object to the lack of advance notice of that assignment, the Board sees no prejudice to have resulted and, in this instance, chooses not to raise any of these issues on its own motion.

---

[9] *See Baxter v. L.T. Walls Constr.* Co., 241 Kan. 588, 593, 738 P.2d 445 (1987); Leroy *v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003); *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2001); *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 2, 2001); *Alvarez v. Bossler Brown & Associates*, No. 1,012,734, 2006 WL 328211 (Kan. WCAB Jan. 18, 2006);

[10] *See Gile v. Associated Co.*, 223 Kan. 739, 740, 576 P.2d 663 (1978); *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Special Administrative Law Judge Vincent Bogart dated November 22, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

_____
BOARD MEMBER

_____
BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Member hereby adopts the majority opinion set forth in *Cervantes v. Safelite Glass Corporation*, No. 1,012,477, (Kan. WCAB April 2006). Highly summarized, the undersigned believes the Board lacks jurisdiction to hear appeals of any Awards issued by Special Administrative Law Judges when there is no documentary evidence contained within the file to substantiate that individual's authority to decide the matter. Accordingly, I would set aside the Award and remand the matter to the ALJ for an immediate determination of the merits. I otherwise agree with the findings and conclusions of the above majority opinion.

_____
BOARD MEMBER

CONCURRING AND DISSENTING OPINION

I agree with the majority's decision not to set aside the SALJ's Award and remand this matter to the ALJ. However, I disagree with the majority's finding of no change in circumstances. Dr. Mills changed his opinions as to both claimant's percentage of functional impairment and restrictions. These establish the requisite change in claimant's

condition and, based upon the record now presented, the Agreed Award is inadequate and should be modified.

_____
BOARD MEMBER

CONCURRING AND DISSENTING OPINION

I agree with the concurring and dissenting opinion immediately above but would further find that the amount of the agreed running award established claimant's percentage of work disability. The evidence establishes that claimant's present work disability is now higher. This establishes that there has been a change of circumstances. I would grant modification of the Agreed Award to award a work disability greater than the 39 percent that the Agreed Award represents.

I also find that claimant's medical restrictions have changed such that his ability to work has been further reduced. This is established by the testimony of Dr. Mills. Moreover, Mr. Hardin established that claimant's ability to earn wages has also been reduced.

In short, the Agreed Award should be modified.

_____
BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Vincent Bogart, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director